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No. 83-2030

In the Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals,
Tenth Circuit

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

| | PAGE |
|--|------|
| ARGUMENT: | |
| I. The only "viewpoint" targeted for regulation by the challenged statute is the teacher-expressed "viewpoint" that persons should commit a specific crime | 1 |
| II. Teachers' interests in advocating the specified crime are outweighed by state interests in fostering the broad goals of public education | 7 |

TABLE OF AUTHORITIES

| Cases | PAGE(S) |
|---|---------|
| <i>Acanfora v. Board of Education</i> , 359 F.Supp. 843 (D. Md. 1973) | 3 |
| <i>Ambach v. Norwich</i> , 441 U.S. 68 (1979) | 3 |
| <i>Board of Education, Island Trees Union Free School District No. 26 v. Pico</i> , 457 U.S. 853 (1982) | 3, 9 |
| <i>Board of Education of Long Beach v. Jack M.</i> , 566 P.2d 602 (Cal. 1977) | 6 |
| <i>Brown v. Board of Education</i> , 347 U.S. 483 (1954) | 3 |
| <i>Coupeville School District No. 204 v. Vivian</i> , 677 P.2d 192 (Wash. App. 1984) | 6 |
| <i>Erznoznik v. City of Jacksonville</i> , 422 U.S. 205 (1975) | 9 |
| <i>F.C.C. v. Pacifica Foundation</i> , 438 U.S. 726 (1978) | 9 |

AUTHORITIES CONTINUED

PAGE(S)

| | |
|--|--------|
| <i>Gay Activists Alliance v. Board of Regents of the University of Oklahoma</i> , 638 P.2d 1116 (Okla. 1981) _____ | 4 |
| <i>Ginsberg v. New York</i> , 390 U.S. 629 (1968) _____ | 9 |
| <i>Kolender v. Lawson</i> , 103 S.Ct. 1855 (1983) _____ | 3 |
| <i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923) _____ | 9 |
| <i>Morrison v. State Board of Education</i> , 461 P.2d 375 (Cal. 1969) _____ | 6 |
| <i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968) _____ | 7 |
| <i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925) _____ | 8 |
| <i>Plyler v. Doe</i> , 457 U.S. 202 (1982) _____ | 3 |
| <i>San Dieguito Union High School District v. Commission on Professional Competence</i> , 185 Cal.Rptr. 203 (1982) _____ | 6 |
| <i>Secretary of State v. Joseph H. Munson Co.</i> , 104 S.Ct. 2839 (1984) _____ | 5 |
| <i>State ex rel. York v. Turpin</i> , 681 P.2d 763 (Okla. 1984) _____ | 3 |
| <i>United Public Workers v. Mitchell</i> , 330 U.S. 75 (1947) _____ | 3 |
| Statutes | |
| Okla. Stat., Title 70, Sec. 6-103.15 _____ | passim |
| Miscellaneous | |
| Note, <i>Free Speech Rights of Homosexual Teachers</i> , 80 Columbia L. Rev. 1513 (1984) _____ | 8 |
| KIRP and YUDOF, <i>Educational Policy and the Law</i> (1982) _____ | 8 |
| SPARLING, <i>Opinions of the Oklahoma Attorney General: An Analysis</i> , 6 Okla. City U. L.R. 373 (1981) _____ | 3 |

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REPLY BRIEF OF APPELLANT

I. THE ONLY "VIEWPOINT" TARGETED FOR REGULATION BY THE CHALLENGED STATUTE IS THE TEACHER-EXPRESSED "VIEWPOINT" THAT PERSONS SHOULD COMMIT A SPECIFIC CRIME.

Notwithstanding the statutory analysis of the Gay Task Force (see Appellee's Brief at 13, 18-20, 27), expressions of sympathy to the homosexual rights cause, exercises of the right to petition the Government for legislative change, condemnations of physical violence against homosexuals, joining the National Democratic Party, teaching the works of Wilde and Keynes, and the advocacy of any "viewpoint" not involving the commission of the specific crime of homosexual sodomy are not even regulated¹ by the challenged

statute. While Appellant takes no issue with Appellee's preferred characterization of the challenged statute as an "anti-advocacy" statute (see Appellee's Brief, at 8, n.7)² it will contest any implication that the proscribed advocacy is of anything other than the commission of a specific criminal act.³

¹Contrary to Appellee's suggestion that the challenged statute effects "flat censorship" within its sweep (see Appellant's Brief at 22), numerous types of advocacy, *even of criminal homosexual sodomy*, are clearly permitted pursuant to it. Advocacy of the specified crime which is not likely to come to the attention of school children or school employees", 70 Okla. Stat. Sec. 6-103.15(A)(2), is clearly not proscribed. Nor is advocacy of the specified crime proscribed, even if likely to come to the children's attention, if extenuating circumstances exist, or if such advocacy is not likely to adversely affect the educational process or corrupt student morals. See 70 Okla. Stat. Sec. 6-103.15(C). Thus, the statutory scheme constitutes regulation, not a flat ban, on teacher advocacy of the specified crime.

²Based on its reading of Part III of the Tenth Circuit majority opinion, Appellee urges that the words "soliciting" and "imposing" were not stricken by that court. Based on its reading of the same admittedly ambiguous paragraph, however, the Board of Education will continue to maintain that the entirety of 70 Okla. Stat. Sec. 6-103.15(A)(2) was stricken, and that the words "soliciting" and "imposing", which perhaps even the Gay Task Force will admit possess a substantial legitimate sweep, should have been addressed by the Tenth Circuit majority in its "substantial overbreadth" calculus. See, e.g., Appellant's Brief at 10, 41.

³In its brief *amicus curiae*, the Attorney General of the State of Oklahoma defends the somewhat broader legal proposition that teacher expressions of controversial social or political viewpoints may be regulated when such advocacy "may promote strife within a school system." *Id.*, at 3, 4. While the Gay Task Force contends that this jurisdictional assertion is overly exuberant, it is not necessary to accept it to sustain the challenged statute, which on its face merely regulates teacher advocacy of a *specific criminal act*. In any case, the Oklahoma Supreme

The Board of Education will further maintain that the state's recognized power to ensure that its public school children are appropriately introduced to traditional, fundamental cultural values⁴ in the context of the public school educational experience empowers it to target certain "viewpoints" for regulation applicable to public school teachers *irrespective of whether the advocacy of such "viewpoints" constitutes advocacy of the commission of a criminal act*. Teacher advocacy of the "viewpoint" that students should take their studies frivolously, or that deceit, misogyny, or racial bigotry are acceptable behavioral attitudes, might well be regulated pursuant to this approach. It is not necessary, however, to conclude that "targeting" teacher "viewpoints" not directed to the commission of crimes is not per

³ (Continued)

Court, based on separation-of-power concepts, has limited the effect even of the more thoroughly reviewed Attorney General Advisory Opinions. See *State ex rel. York v. Turpin*, 681 P.2d 763, 766, 767 (1984); see generally Sparling, *Opinions of the Oklahoma Attorney General: An Analysis*, 6 Okla. City U. L.R. 373, 374-375 (1981). In any case, Appellant, not the Attorney General, is responsible for the enforcement of the statute. This Court has recognized the importance of limiting enforcement policies proffered by courts or enforcement agencies. *Kolender v. Lawson*, 103 S.Ct. 1855, 1857 (1983). The absence of prosecution since the statute's inception would belie any intent by Appellant to enforce it beyond its obvious effect of regulating teacher advocacy of the commission of the specified crime. See generally, *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (related ripeness issues).

⁴See, e.g., *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 864 (1982); *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *Acanfora v. Board of Education*, 359 F.Supp. 843, 847 (D. Md. 1973).

se unconstitutional⁵ to sustain the challenged statute, which is facially limited to teacher advocacy of a specified criminal act.

Nor does the statutory sweep encompass efforts to effectuate legal and social change. The Oklahoma Supreme Court has recognized the constitutional protection enjoyed by peaceable advocacy of the repeal of criminal statutes. *Gay Activists Alliance v. Board of Regents of the University of Oklahoma*, 638 P.2d 1116 (Okla. 1981). On the social front, much pro-homosexual advocacy is *not even regulated* by the challenged statute, including, for example, teacher advocacy of homosexual cohabitation, holding hands, and public kissing. Far from abridging any right to "core political speech" (advocacy of legislative change, for example), the statute regulates only the advocacy of a specified criminal act, and only when, on a case-by-case basis, an adverse effect on the educational environment or student morality has been found.

The Gay Task Force has attacked the statute's *nexus* factors as vesting virtually uncontrolled discretion in administrative hearing officers, creating a *de facto*, *post-hoc* licensing scheme, which maps out no hard core of easily identifiable unregulated conduct. This contention both fails to appreciate the quantity of conduct, described above, which plainly falls outside the statutory sweep, and hypothetically misconstrues the limiting force of the *nexus* factors.⁶

⁵Even the Gay Task Force seems to agree that such targeting might be validly pursued provided that legitimate governmental goals cannot be more narrowly achieved. Appellant's Brief at 23.

⁶Appellee has sought support for its conclusion that the *nexus* factors are not curative of any perceived statutory flaw by reference to this

First, the five cases propounded by the Gay Task Force as bringing the instant statute within the constitutionally proscribed area of standardless *post hoc* licensing, see Appellee's Brief at 15, n.20, beg the question, since the fatal defect in those cases was the *inadequacy* of their criteria, not their *existence*. Second, notwithstanding Appellee's vigorous protestations, see Appellee's Brief at 26, these factors are not "facially irrelevant to job competence" in light of the broad purposes of public education, involving the exposition of both knowledge and values.⁷ Third, it must be noted that the *nexus* factors bear striking similarity to court-approved subordinate criteria for applying more ge-

⁶ (Continued)

Court's holding in *Secretary of State v. Joseph H. Munson Co.*, 104 S.Ct. 2839 (1984), that the "possibility of a waiver" of Maryland's 25% limit on charitable fundraising expenses did not save that limitation from overbreadth invalidation. See Appellee's Brief at 16. Appellee, however, has failed to appreciate that the "fundamental defect" found by the *Munson* plurality was a *universally* mistaken premise "that high solicitation costs are an accurate measure of fraud", 104 S.Ct. 2839, 2852 (1984), a situation that truly rendered the statute fundamentally flawed, impermissible "*in all its applications*". *Id.* (emphasis added). Since the fundamental premise of the challenged statute is that *some* public advocacy of criminal sodomy (depending on the *nexus* ramifications) may create either sufficient educational disruption or corruption of student morals to warrant employment intervention, the statutory underpinning here is distinguishable from that in *Munson*. This reasoning also rebuts Appellee's claim that the statute *conclusively* presumes that "teachers' speech sympathetic to homosexuals is somewhat *inherently* unprotected", Appellee's Brief at 19, since it is the purpose of the *nexus* factors to permit a case-by-case determination of when it is, and when it is not. For examples of probable applications, see note 8, *infra*.

⁷See Appellant's Brief at 23-26, note 4, *supra*, and note 9, *infra*.

neric "teacher fitness" statutes,⁸ which would likely assist administrators if and when specific factual circumstances should arise.

In sum, the challenged statute is narrowly drawn, regulating, not prohibiting, the manner in which public school teachers advocate the crime of homosexual sodomy, leaving the advocacy of both legislative change and other forms of homosexual behavior unregulated. The narrowing *nexus* factors are as precisely drawn as is possible, given the breadth of the permissible legislative purposes in question. In any case, it cannot be presumed as a matter of law that Oklahoma Boards of Education, in applying the statutory

⁸See, e.g., *Morrison v. State Board of Education*, 461 P.2d 375 (Cal. 1969), where the California Supreme Court included, among the factors which may be considered pursuant to its generic "fitness" statute, "the likelihood that the conduct may have adversely affected students or fellow teachers", "the proximity or remoteness in time of the conduct", and "extenuating or aggravating circumstances". *Id.* at 386. The similarity of these court-approved factors to the first three *nexus* factors of the challenged statute is indeed remarkable; the absence of the fourth in *Morrison* is accounted for by the more specific harm addressed by the Oklahoma Legislature in the challenged statute. Cf. *Coupeville School District No. 204 v. Vivian*, 677 P.2d 192, 196-197 (Wash. App. 1984); *San Dieguito Union High School Dist. v. Commission on Professional Competence*, 185 Cal. Rptr. 203, 205 (1982). For a prototypical example of how the statute is likely to operate in the real world, see *Board of Education of Long Beach v. Jack M.*, 566 P.2d 602 (Cal. 1977), which used similar *nexus* factors to reinstate a teacher-dismissed for committing a homosexual act, because that act did not come to the attention of students or teachers *in fact*, was an isolated act preceded by unusual stress, and was unlikely to be repeated.

The Board of Education does, however, dispute Appellee's suggestion, see Appellee's Brief at 28, n.41, that the only interests which the State may protect in its educational system are interests "wholly unrelated to homosexuality". Cf. text following note 9, *infra*.

nexus factors, which have been applied in similar incarnations by various state courts over the last twenty or so years and which have *never* been invoked in the seven years of the challenged statute's existence, will precipitously attempt overzealous applications thereof. If, in fact, a "chill" exists at all, it is necessarily the product of that kind of subjective, impressionistic, and irrational fear as to which this Court has habitually refused relief.

II. TEACHERS' INTERESTS IN ADVOCATING THE SPECIFIED CRIME ARE OUTWEIGHED BY STATE INTERESTS IN FOSTERING THE BROAD GOALS OF PUBLIC EDUCATION.

While expressing a preference for the "less restrictive alternative" standard of review, the Gay Task Force has simultaneously urged that the *Pickering* balancing approach, 391 U.S. 563, 568-574 (1968), be applied only in a viewpoint-neutral manner, Appellee's Brief at 22, potentially precluding the discipline of teachers who, away from the classroom, publicly advocate deceit, irresponsibility, misogyny, or racial bigotry, unless a substantial disruption of the classroom environment arose, *even if a detrimental effect on student morality or ethical values could be demonstrated*. Such an effect, of course, is contemplated by the statute's final *nexus* requirement. Appellee's suggested approach fails both to properly apply the *Pickering* standards, and to apprehend that the effectuation of the broad goals of public education⁹ — including social integration — is its founda-

⁹See, e.g., Appellant's Brief at 23-26; text accompanying note 4, *supra*. Schools cannot foster "fundamental values" or play their vital role in preserving our system of government without making viewpoint-based

tional reason for being. Clearly, teacher advocacy of criminal sodomy has been recognized to have the potential for educational disruption:

A class of sixth graders, entering adolescence and troubled by their own developing sexuality may be significantly disrupted by the presence of a homosexual teacher who has recently expressed his or her views on the subject in . . . local newspapers.

Note, *Free Speech Rights of Homosexual Teachers*, 80 Columbia L.R. 1513, 1523 (1980). Concerning the "role model imitation" issue raised by the final nexus factor, while the Board of Education is well aware of the heated academic debate regarding whether homosexuality is predominantly a function of hereditary or environmental factors, it would respectfully urge this Court to refrain from concluding as a matter of law that impressionable students will not be induced to commit homosexual sodomy by their teachers when no consensus has been reached on that issue by the medical and scientific community as a whole. This Court has not heretofore demanded "scientifically certain criteria

• (Continued)

statements, particularly regarding youth in their impressionable years. Since "certain studies plainly essential to good citizenship must be taught, and . . . nothing taught which is manifestly inimical to the public welfare", *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925), then certain viewpoints, such as obedience to law, must be encouraged. This educational purpose is so important that studies show that "second and third-grade teachers consider the obligation . . . to conform to school rules a more important lesson than reading and arithmetic." D. KIRP and M. YUDOF, *Educational Policy and the Law* 147 (1982). It is because of the unique responsibility of the State for its students as students that Appellee's attempted analogy to prison inmates' censorship, see Appellant's Brief at 28, is inapposite.

of legislation", *Ginsberg v. New York*, 390 U.S. 629, 643 (1968), in cases involving protection of the interests of impressionable minor children.

The family also has a vital interest in schools, cognizable under *Pickering*, as parental interests in the direction and control of a child's education are central to constitutionally protected familial privacy rights. See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). When the State, acting in loco parentis, has custody of children for specified times, it is required to perform the responsibilities of that custody in a protective and constructive manner.

The minor child also has a privacy interest, recognized by this Court in *Ginsberg v. New York*, 390 U.S. 629 (1968) and *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), even where the child-audience was in no way "captive". This Court, rather than permitting the *Ginsberg* rationale to fall into desuetude, has recently reaffirmed its basic thrust:

It is well settled that a State or municipality may adopt more stringent controls on communicative materials available to youths than on those available to adults. See *Ginsberg v. N.Y.*, 390 U.S. 629 (1968).

Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975).

In sum, this Court has recognized both the validity and significance of the community interest "in promoting respect for authority and traditional values, be they social, moral or political". *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (emphasis added). Parents and students have correlative interests pursuant to the *Meyer* and *Ginsberg* approaches

described above. Applying *Pickering*, these interests outweigh teacher interests in the advocacy of the specified crime. Even assuming *arguendo* the cognizability of the "less restrictive alternative" approach as a *Pickering* balancing factor, no such alternative is available to meet the *sui generis* threat created by teacher advocacy of this specific crime.

Respectfully submitted,

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